# United States Court of Appeals for the Second Circuit



# BRIEF FOR APPELLANT

76-7557

PEALS OUT

Docket No. 76-7557 76-7572 76-7589

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ANTHONY PEREZ, JR.,

Plaintiff-Appellant-Appellee

-against-

MUHAMMAD ALI a/k/a Cassius Clay,

Defendant and Third Party Plaintiff-Appellee-Appellant

-against-

AMERICAN BROADCASTING COMPANIES, INC. and ABC SPORTS, INC.,

Third Party Defendants-Appellees-Appellants.

BRIEF FOR PLAINTIFF-APPELLANT-APPELLEE

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#### Preliminary Statement

This is a defamation action, in which the plaintiff
Anthony Perez Jr. ("Perez"), a referee of professional boxing
matches, and the defendant Muhammad Ali ("Ali"), the heavyweight
champion of the world, seek compensatory and punitive damages
for the statements each made about the other following a heavyweight championship fight, refereed by plaintiff Perez, between
the defendant Ali and Chuck Wepner in Cleveland, Ohio on March
24, 1975. Ali also counterclaims for personal injuries which he
allegedly sustained in the fight.

Following a trial before the Hon. Milton Pollack and a jury whereat the parties stipulated that they were public figures with respect to the events and controversy which gave rise to the instant litigation, the jury found against both Perez and Ali on the defamation claims (672-673). The Trial Court dismissed Ali's claims for personal injuries when absolutely no proof was produced to support them. From the judgment entered upon the jury's verdict, the plaintiff appeals.

As is hereinafter fully documented in detail plaintiff

Perez contends that he is entitled to a new trial by reason of the

Trial Court's prejudicial conduct in its comments and actions

before the jury and its erroneous rulings and decisions which cul
minated in a charge which was inaccurate and biased in its marshall
ing of the evidence and wholly one-sided in its instructions to

the jury, denying the equal applicability of the relevant legal

principles to the respective defamation claims of the parties

including the right of reply. It should be noted at the outset

that in this latter respect, upon plaintiff's exception to the marshalling of evidence included in the charge, defense counsel actively misled the Court below as to the evidence in the record so that the Court refused to correct the material omissions in its charge.

Throughout the course of the trial, the Court below, exuded contempt for the plaintiff, his counsel and for the dispute which the Trial Court wrongfully predetermined the plaintiff had started. The Trial Court prejudicially evinced this contempt antithetic to both explicit and implicit statutory and decisional authority by sarcastically attacking the credibility of Perez before the jury, by thwarting plaintiff's efforts to impeach defendant Ali's credibility through its improper restriction of plaintiff's examination of Ali, by actively assisting the defense in the phrasing of questions, in eliciting testimony which could be anticipated to be damaging to Perez and while demonstrating a great contempt for plaintiff, displaying an equally great deference and courtesy to the defendant.

Predicated upon all of the foregoing, plaintiff Perez most respectfully contends that the aforementioned abridgement and deprivation of his right to an equitable and fair trial militates the granting of a new trial.

#### Questions Presented

- 1. Whether the Court below committed reversible error warranting a new trial by its charge to the jury which (a) inaccurately marshalled the evidence so as to exclude from the jury's consideration Ali's press conference remarks about Perez; (b) predetermined that the 'verbal bout' characterized as an assault was initiated by plaintiff Perez; and (c) limited the privilege of reply to defendant Ali.
- 2. Whether the cumulative impact of the Trial Court's prejudicial comments and demeanor towards plaintiff and his counsel, unbalanced interference in the examination of witnesses and one-sided evidentiary rulings was so prejudicial as to deny plaintiff a fair trial warranting the direction of a new one.

#### Statement of Facts

Anthony Perez, Jr., a referee licensed since 1968 by the New York State Boxing Commission (73), was evaluated to be amongst the three top referees in the country by defense expert Jimmy Jacobs (522.)

Anthony Perez Jr. refereed three of the defendant's fights, including the Frazier-Ali and Wepner-Ali fights which are associated with this controversy. Briefly, following the Wepner-Ali fight, Ali, obviously dissatisfied with Perez' performance as referee, displaying the contentious, bellicose truculence typical of Ali's promotional techniques, attacked Perez calling him a dirty dog at a press conference indicating he was going to get him and never let him work in his corner again and even on an ABC Wide

World of Sports program flatly stated that Perez had a bet on Frazier when he refereed the prior Frazier-Ali fight, asserting that Perez was probably paid by gangsters to prematurely end a round where he was about to knock out Frazier and that his conduct in the Wepner fight was part of a conspiracy to take his title away.

Perez' reputation in the community as an honest referee was acclaimed at trial by the Chairman of the New York State Athletic Commission, James Farley Jr. (504), Commissioner Billy Recht (367-368), sportscaster and commentator Howard Cosell (479), newspaper sportswriter Dick Young (414) and even Ali's trainer Angelo Dundee (460), who testified that he believed and still believes that Perez is an honest man who performed poorly during the Wepner-Ali fight (464-465).

The parties' stipulated status as public figures required proof by clear and convincing evidence that the statements made by Ali concerning Perez were made with actual malice, that is, with reckless disregard for their truth or with actual knowledge of the falsity thereof (634). Ali testified at trial he truly believed when he made the statement that Perez had a bet on Frazier and was paid by gangsters and that he believes it even more today (257).

In view thereof, plaintiff submits that Ali's character as to truthfulness or untruthfulness could hardly be more germane. Ali is a man who has made a career of creating and promoting false c ontroversy calculated to build up the gate for his fights and to put himself at the forefront of the public's eye as an international figure: a man who commonly says anything and everything with total

disregard for the truth as he makes his way to the bank with the millions of dollars he realizes as consequence.

Notwithstanding that the jury's assessment of Ali's credibility was the critical determination to be made herein the Trial Court wrongfully and steadfastly barred plaintiff's proof of this most relevant aspect of his nature and even sought to thwart plaintiff's efforts to impeach Ali's credibility as is hereinafter discussed in detail.

#### The Frazier-Ali fight

Under the New York State Boxing Commission Rules, a referee's selection is made by the Chairman (60) and announced one hour before the fight. Referees in contention for selection are notified to be present at the Garden at weigh-in time which is usually around 11:00 o'clock on the morning of the fight to await the evening's announcement (71, 182).

Frank Morris, Deputy Commissioner of the New York State
Athletic Commission, described the custom and practice which allows
a fighter to object to the selection of a particular referee or
judge in whose presence he does not wish to fight (60-61) and to
so notify the Commission at weigh-in time (62).

In 1974, Muhammad Ali and Joe Frazier fought a 12 round match in Madison Square Garden which was refereed by Perez (77), who was advised that he was to referee the fight one hour before the fight in accordance with the New York State Athletic Commission rules (71-72).

The fight was a 12 round non-championship fight which Ali won upon the unanimous decision of the referee Perez and two judges (86).

During the course of the second round, after Ali landed what was characterized by Howard Cosell as a good right which caused Frazier to stagger and back away, Perez prematurely stopped the fight and called the end to the round when there was still approximately 20 seconds left in it (88, 199). When Perez realized his mistake, he called the fighters back into the ring to continue fighting (86).

Perez testified that he thought he heard the bell signifying the end of the round (89).

Although defense counsel alluded to a Commission investigation of the incident in his opening (21), the Trial Court blocked plaintiff's effort to prove that the Commission had cleared plaintiff of any wrongdoing (69-70).

The Frazier-Ali fight was otherwise uneventful, except for the subsequent complaints of Frazier and his manager that Perez allowed Ali to "hold", a foul under the rules, which frustrated Frazier's style of inside boxing (121).

At trial, Ali testified that although he received an anonymous telephone call on the day of the fight, at around noon, warning "that we have the referee", he raised no objection to the possibility of Perez' being selected as referee nor did he think anything of Perez' mistake since he won the fight easily (283-285, 504).

Ali contended at trial that in the second round he had just hit Frazier very hard, so hard that he was about to knock him down (381-382) when Perez pretended to hear a bell which Ali did not hear (265).

Allegedly, it was not until Perez' poor performance in the

Wepner-Ali fight that Ali concluded Perez had been paid by gangsters or had a bet on Frazier, causing him to stop the fight in the second round so as to prevent a knockout of Frazier\*.

However, defendant Ali wrote an autobiography entitled "The Greatest" wherein he expressly contradicted much of the aforementioned trial testimony concerning the Frazier fight (418-420, 422).

In the book which has a foreword personally signed by the defendant, he made the following statement:

> "Yes, I was saving it for my second fight with Frazier coming up next. But while training for Frazier, the pain was almost unbearable. Fven to be hit on the hands by sparring partners when boxing blows was torture. At first it was only the right hand, but them [sic] both hands. Herbert had asked me to fly into Boston to see the famous hand specialist Dr. Richard Smith at Massachusetts Hospital. I knew my days as a fighter were numbered, but the treatment they prescribed seemed too costly, complex and log

Besides, when I got back to camp the pain had eased. I began tearing into sparring partners and the heavy bag to make up for lost time. Then

suddenly it was back again and worse.

"'Sparring partners now hit you with blows a baby could get away from', Bundini lamented. 'Champ, if there is something wrong, let's leave boxing. We can make it somewhere else. Frazier is like a tank,' Blood said. 'You need anti-tank guns, Champ. You ain't got no anti-tank guns now. They broke.'

"It was less than three weeks before I was scheduled to go in the ring against Frazier. I wanted the return match with Joe Frazier, not only to wipe out the first decision against me, but because Frazier was probably the most ruthless, aggressive and competitive heavyweight in modern times. I had to whip Frazier to establish any claim to a title fight. Then, too, a deep, personal fued [sic] had grown up between us. Our fights were not just for money but for our lives. Whatever would happen to me in the

<sup>\*</sup>Defense expert Jimmy Jacobs acknowledged that with less than 20 seconds left in the round it would have been virtually impossible to have knocked Frazier out in view of the three knockdown rule (527-528).

future, my body was now at its peak. I had everything to do to master Frazier or any other fighter.

"Herbert Muhammed was on the phone 'If the hands are no better in two weeks we are calling the Garden to cancel the fight. It's better we bow out of boxing now than risk any injury. Nothing in boxing is worth that.'

"'I think they're getting better,' I said, 'They will be all right.'

"'I hear what you say. I know why you say it, ' Herbert answered, 'but just the same... "Herbert had assigned C.B. to report on my hands early in training, not only during the Frazier training, but during my training for Norton and Quarry. Now they had Blood and Budini watching me for signs that might indicate danger."

On page 396 right in the middle:

"But I knew I have to have help, so when Lou Beltram, a friend since I moved up to the mountains, asked me to go to a nearby town to see his personal physician, Dr. Peter Greco, I agreed.

"But the condition of your hands no,' the doctor said, 'I would say you should cancel the fight.'

'I felt hostile. 'That's a judgment for me to make' I said. All I want to know is if there is anything that can be done to help me before I fight Frazier.'

"He said he would try, Almost every day he came to camp to give me cortisone and hot wax treatments. I doubt [sic] a hot wax applicator, and all through the day and evening I doused my hands. Slowly they seemed to improve." (505-508)

"This may have saved Frazier from a knockout

in the second round of that last fight.

"I had him groggy and waving, but I did not follow-up. Not only because the timekeeper rang the bell too soon, but because I was saving my hands. I wasn't sure I had hit him that hard." (424) (emphasis supplied)

At trial, the Court refused to allow inquiry into whether he had trouble with his hands prior to the Frazier fight (299-301).\*

<sup>\*</sup>While Dundee initially denied that Ali had such hand trouble, he recalled Ali taking hot wax treatments (435-436) and identified the Lou Beltrami cited in the above quoted passage (438).

In fact, at the trial Ali denied that he had written or that he had ever read the book, alleging he could not read (260-261, 266-267).

The Trial Court improperly excluded the book and any statements contained therein including those quoted above until Ali's examination had been fully completed and a representative of the publisher produced the contract which established that Ali had agreed to author this non-fiction work about his life and that the book which plaintiff sought to use was in fact the book published pursuant to that contract. The Trial Court thereupon flipflopped and allowed the introduction of the aforequoted passages. (This was after Ali was no longer on the stand.)

Throughout the course of Ali's examination, the Trial Justice so narrowly and unfairly restricted plaintiff's examination of the defendant contending that plaintiff was bound by defendant's answers on what it characterized as collateral matters which were deemed to be irrelevant to the inquiry (249-250, 260, 261, 272-273, 275-276) that when the Trial Court finally reversed its prior ruling as to the book, plaintiff sought to bring Ali back to the stand. Demonstrating great irritation, Trial Justice immediately accused plaintiff's counsel of dilatory tactics\* (354-365, 471-473).

<sup>\*</sup>It should be noted that throughout the course of the trial, the Court below would frequently resort to personal criticism of plaintiff's counsel in an effort to restrain aspects of plaintiff's case which the Court had predetermined were irrelevant or objectionable (99-100, 186, 253, 261-262, 297, 328, 603, 621, 654, 660, 663, 466, 508-509)

The book details Muhammad Ali's philosophy of promotion and the advertising techniques which he has successfully employed throughout his career. He describes how he has made millions by creating false controversy, fomenting disharmony with feigned anger and staging and participating in shenanigans which erupt with verbal assault and attack upon alleged enemies.

Proof of this penchant for pretense to attract attention and interest in the defendant's career as a money making machination was improperly excluded from the jury's consideration because the Trial Court refused to allow the plaintiff's trial counsel to elicit any testimony from the defendant related thereto, nor would it allow the use of inconsistent statements contained therein to impeach the credibility of defendant Ali while he was on the stand nor would he allow the plaintiff to use the defendant's autobiography for the limited purpose of refreshing the defendant's recollection (265-267, 272-273, 282, 301, 312-313, 354-367, 369-370, 381-382, 421-422, 471-475).

#### The Wepner-Ali fight

The Wepner-Ali fight - a fight between a man reputed to be the greatest heavyweight champion that has ever lived and a man known as the "Bayonne Bleeder" who flatly admitted at trial that he was not even a boxer but a roughhouse fighter, was described as the classic mismatch of the century (109). The Ohio State Boxing Commission, organized just a few weeks before, didn't even have a set of rules to govern the fight. The atmosphere in the Cleveland Coliseum was circuslike (26, 34).

The fight, another of defendant's money-making promotions, was not a memorable one for champion Ali who was apparently

out of condition and unprepared for the great stamina displayed by Wepner who went fifteen rounds with him.

F 'ez was advised three days before the fight that he would be the referee (75, 229).

Perez testified that when he appeared at the weigh-in which occurred on the day before the fight, he spoke to the defendant (75). In fact, he asked the defendant if he would pose with Perez' girl friend while Perez took a picture of them which defendant Ali quickly consented to, kidding Perez that he had lost his girl (511).

At trial, Ali denied knowing who was to referee this fight until he entered the ring and saw Perez (249). He further denied ever seeing or speaking to Perez on the day of the fight or before, nor did he acknowledge that his photograph with his arm about Perez' girl friend (Exhibit 37 for identification), refreshed his recollection of this meeting or incident (250). The Trial Court contended that this plaintiff was bound by defendant's answers in all collateral matters (249-250).

The Trial Court's further refusal to allow Perez to identify the photograph for purposes of introducing same into evidence, sustaining all objections to its admission is also assigned as error herein (509-511).

Although Ali allegedly received another anonymous telephone call on the day of this fight, again warning him about the
referee, he raised no objection to Perez' appointment as referee
when he entered the ring and allegedly saw Perez for the first time
(283-284, 249, 251).

Angelo Dundee, Ali's trainer, testified that he knew two days before the fight that Perez was scheduled to referee it, but testified, unbelievably, that he did not discuss Perez' appointment with Ali (430). He confirmed, however, that no one objected to Perez' appointment from the Ali camp (431-432).

Mr. Dundee who was suddenly called to the witness stand by plaintiff's counsel upon Dundee's unexpected appearance in the courtroom contradicted Ali as to when the anonymous phone call was received. He claimed that Ali had received the alleged call the day before the Ali-Wepner fight at the time of the weigh-in (461).

Ali's trainer Dundee testified that he spied on the Wepner camp prior to the fight and found Wepner was engaging in dirty fighting during his training (458). He told Ali what he had discovered but Ali allegedly told Dundee not to worry about it, that he would take care of it (459).

Although Ali contended that he did nothing unusual in his training in order to prepare for the Wepner fight (274) at his examination before trial he acknowledged that he knew of Chuck Wepner's particular style of fighting which included throwing millions of foul blows like rabbit and kidney punches and Ali attempted to prepare himself the best he could for such a fight (280).

Under New York State Boxing rules, rabbit punching (blows to the back of the head) and kidney punches (blows to the kidney area) are characterized as minor fouls (39-40). Sometimes a boxer may unintentionally rabbit punch when his punch glances off the side of the head (43, 47). If the punches are intentional, a

referee has discretion to warn the boxer, take away points or even take away the round from the boxer, depending upon his conduct. If he persistently fouls in any respect, the referee also has the option to stop the fight and award victory to the other corner (49). A major foul which consists of unsportsmanlike conduct, such as hitting a referee or cursing at a referee, can precipitate the immediate end of a fight.

John LoBianco, a New York State Boxing Referee for many years, testified at trial that it is within the discretion of the referee to do any or all of the foregoing in order to control the fight.

The Wepner-Ali fight was characterized by Perez as the roughest fight he ever worked which included Ali's cursing at him calling him a white mother fucker and even hitting him(115, 157-158, 219).

Chuck Wepner complained that Perez thwarted his roughhouse style of fighting which requires him to fight inside, body
punching the other fighter, so as to prevent Ali, known for his
quickness from running and tiring him. Wepner claimed that
whenever he would get close to Ali, the defendant would then grab
him behind the head, pull him down and hold him, which parenthetically is a minor foul under the rules, so that Perez would
come in and break the fighters apart, thus aiding Ali in keeping
his distance from Wepner (26). Wepner claimed that Ali had been
warned repeatedly for holding, a complaint which, as indicated,
Frazier also had.

Ali, on the other hand, contended that Wepner was permitted to fight what he characterized as a dirty fight consisting of

rabbit and kidney punches (292, 334).

Howard Cosell's blow by blow description of the first round of the fight reveals that Ali initially did not throw a punch towards Wepner and laid upon the ropes in an attempt to wear Wepner down. He described how several of Wepner's blows missed Ali and then indicated that Ali complained to Perez about "an alleged rabbit punch by Wepner" (111).

The first punches thrown by Ali in the round consisted of six intentional rabbit punches to the back of Wepner's head (111). Perez asserted that he had warned Wepner about rabbit punching in the first round before Ali complained about it (218). Wepner confirmed that he had been warned (34.) However, he further indicated that he considered most of Wepner's rabbit punches as unintentional. Upon the flurry of rabbit punches by Ali, Perez similarly warned Ali. In view of the fouling by both sides, Perez decided not to penalize either side as it was within his discretion to do (217-218).

Perez stated that during the course of the fight Ali repeatedly cursed him and it is to be noted that at one point Ali hits Perez (111, 115, 157-158, 219). Cosell indicated that Ali paid more attention to Perez than he did to Wepner.

The Trial Court intervened when Perez complained at trial of the foregoing to establish that Perez did nothing to penalize Ali for such language in a manner calculated to discredit the testimony (158-159).

Perez testified and Wepner confirmed that throughout the course of the fight that he warned both fighters as to their fouling.

The blow by blow description rendered by Howard Cosell, which appears at pages 111-142 of the record, shows a pattern of Wepner's ineffectively flailing away at Ali, intentional rabbit punching by Ali in response to what he characterized as rabbit punching by Wepner, continual complaints by Ali to Perez and the separation of the fighters precipitated by Ali's holding.

Howard Cosell indicated that Perez worked harder and was more active than either fighter. At one point both fighters were yelling at Perez (117). He further stated that Ali devoted more time to Perez than to his adversary Wepner who clearly was no match for Ali, notwithstanding the fact that Ali was overweight at the time and had not trained sufficiently for the fight.

In the ninth round of the fight, Ali was knocked to his feet. According to Howard Cosell, Wepner landed a clean punch beneath Ali's heart, which caused an already offbalanced Ali to completely lose his balance (133.) Ali was apparently not hurt by the blow or the knockdown but was described by Cosell as embarrassed by the fall.

Ali claimed at trial that Wepner had used an old fighting trick, stepping on his foot, to cause him to lose his balance and fall. He had a photograph which appeared in a Cleveland paper which he claimed supported his contention in this regard. Wepner denied ever stepping intentionally or unintentionally upon Ali's foot (25, 29).

Perez concluded that it was a clean knockdown based upon what he observed and suggested that the photograph showed that Ali was already on his way down with Wepner only approaching Ali in the picture (202-204).

Perez conceded however that at the time he scored the knockdown he was not observing the feet of the fighters (201, 204).

Perez gave the following testimony:

"Q. What is your explanation, sir?

A. You see that picture -- I don't know, but I could tell you that that man has been connected already and he is on his way down already before that foot is on top of him.

That man is on the way down already because of the punch, and now as the foot is coming. I am talking only about the picture. I never saw it in the fight". (204)

Illustrative of the kind of prejudicial sarcasm of which this record is replete, was the sarcastic question of plaintiff:

"THE COURT: Is it your understanding that Wepner's foot was put on Ali's foot to keep him from falling, is that what you are saying?". (204)

The Court's question prompted plaintiff's counsel to move for a mistrial which was denied (Court's Exhibit 9 (206)), but the Court's immediate instruction to the jury, set forth below, evidenced his own recognition of the impropriety of his question and the time thereof:

THE COURT: The jury will understand, all I am trying to do at any time, although I may make any ruling or ask any question, is an endeavor to assist the jury by bringing out the facts.

I have no views as to who is right or who is wrong, and I don't intend to present any personal views in this case.

You are not to take any question or any comment of mine any more than what I told you previously with respect to lawyer's comments.

The evidence comes from the exhibits and from the testimony. Those are the things that you will consider." (205)

The personal view embodied in the foregoing question could hardly be more patent. It is plaintiff's intention that the cumulative impact of the numerous cited similar demonstrations of partiality require that this plaintiff be afforded his opportunity for a trial in an atmosphere that is not permeated with such obvious bias. The Press Conference

Immediately following the Ali Wepner fight, a press conference was held in the Cleveland Coliseum, as is the custom and practice following any title defense match.

Perez indicated that he was called into the room by the reporters to answer questions concerning the rabbit punching incidents, his scoring of Ali's fall in the 9th round as a knockdown and his premature termination of the fight. (Plaintiff's Exhibit 4 for identification, 174-175).

Defense counsel did not play the actual tape of the press conference remarks. It is to be noted that Plaintiff's Exhibit 4 which purports to be a tape of said conference provided by ABC does not contain all of the statements which defendant contended Perez made at the press conference in its counterclaim.

Throughout the course of the press conference, although Ali complained of Wepner's dirty fighting tactics, he nevertheless praised Wepner for going 15 rounds with him. He unrelentlessly attacked Perez' performance and maligned him throughout the course of the press conference as Perez stood by and listened.

Ali made the following statements to the press concerning Perez which evidenced his malice, spite, ill-will and clear intention to injure Perez:

"ALI: Perez is a guy on the spot. He is not white nor black. He's a Puerto Rican. He's trying to be

white. He's a dirty referee. I never want that man to referee another one of my fights. That's right. He's dirty all over the world. That man hit me on my head all the time. He didn't say nothing. So I told you that I take the law in my own hands and hit him back. I hit him back and he stops me-dirty dog. I don't never want that Perez in my damn corner - never want him - dirty dog.

I had Joe Frazier knocked out. I had Joe Frazier knocked out in this and he didn't even see it. He pretended the bell rang. I don't fight in barrooms. I wouldn't fight. I would shoot a man before I fight him - i'll cut him. Black people cut you."

"He's a dirty referee and they just kept letting him do it. That's bad. And you know what I did to him, you saw me try to kill him when he was falling. I usually pull off a man when is on the ropes, when his hands were down and I tried to knock his head off. That's dirty letting him fight me dirty. I try to kill him."

"The referee didn't say nothing. I could see that in the Jack Johnson days, doing all that racist stuff. You don't do that nowadays. You don't allow this kind of things to happen nowadays with the world. Because I am going to talk about him. I'm goint to preach this sermon to every Moslem Temple I go, every college. I am going to spread it and they're going to watch it. I am protesting against the referee (unintelligible). I'm out to get the referee. I'm going to compaign against him. I'm going to get films and show it to people. I'm going to make it a big issue. There's not going to be any more dirty racism - racism'.

The entire tape of the press conference was played for the jury, although its contents were not transcribed into the minutes. (Plaintiff's Exhibit 4, 241). As is later more fully explained, the Trial Court denied that the foregoing evidence even existed and made a critical error in its charge to the jury as a result of its misapprehension which error goes to the very heart of this appeal \*

\*This Court is respectfully requested to remand this case for a hearing in the event further issue is made as to whether such evidence was in fact presented to the jury during the course of the trial.

Perez' responses to press questions on the day following the fight

On the day after the fight and the press conference where Ali 'blasted' Perez' performance as referee and announced to the world that he would get Perez, the following response was made by Perez to the press when he was questioned about the contraversy which had arisen as result of Mr. Ali's inflammatory words:

"He [Ali] purposely did the rabbit punching. Chuck did not do it purposely. If there is one man who fought dirty last night, I think it was Ali."

"A clean knockdown. Ali tripped on his own feet but he went down from the effect of the punch, in my opinion. He's just embarrassed because a man like Wepner knocked him down." (628)

The foregoing statement by Perez, made after Ali's verbal assault upon him at the press conference, quoted in paragraph #27 of Ali's answer, constitutes the basis upon which Ali claims he is entitled to damages for defamation in his counterclaim.

#### Perez' telephone call to Howard Cosell

Upon hearing that Ali was going to be interviewed by Howard Cosell upon ABC's Wide World of Sports following its showing of the Wepner-Ali fight, Perez telephoned Cosell because

he was concerned that Ali would repeat his press conference attack upon Perez again on the air.

Cosell testified that he told Perez that if the subject came up, he "would present his (Perez) side of the issue to Ali during the course of the interview as a reporter in a controversial situation pursuing the subject and bringing all the facts and charges before everybody". (487). Parenthetically, at his examination before trial, Cosell testified that he told Perez that he would try and control Muhammad during the course of the interview and to acquaint him with Perez' positions on the issues raised by Ali (486).

## Ali's statements upon ABC's Wide World of Sports

On March 28, 1975, Howard Cosell taped an interview with the defendant which was aired on March 29, 1975 wherein Muhammad Ali made the following statements about Perez:

"MR. COSELL: All right, what we're going to do in just a moment, Champ, is take a look at some of the highlights of the fight and have you talk about them. The so-called rabbit punch sequences of the first round--

MR. ALI "so-called" ! They were dirty rabbit punches--

MR. COSELL: All right, we'll get to that in detail--

MR. ALI: "The referee allowed them. The dirt was allowed so I got dirty with him--takes dirt to fight dirt.

MR. COSELL: Okay. Just a little more of the pugnacious nature of the champion, who's not happy about what happened last Monday.

MR. ALI: Pugnacious? What do you mean pugnacious? What do that big word means: You went to law school--

MR. COSELL: Truculent (144).

MR. ALI: Truculent?

MR. COSELL: Overaggressive, militant!

MR. ALI: He was the one. I was defending myself.

MR. COSELL: Champ, what we're going to do first is take a look at the rabbit punch sequences of the first round. You talk over them--and express yourself as volumably as usual if you will. Here we go--

MR. ALI: Well, there was promoted before this fight that this man was going to throw dirty shots-hitting behind the head. There he go--right behind the head. That's totally illegal, and the referee's just as dirty as him. He didn't say nothing about it. Look at him. All them punches are illegal. I hit him back a side his head--and the referee will come in and he'll say something to us now--because I'm doing it. too. See, I'm telling him now "Watch that sucker--he's doing it--he's doing it."

MR. COSELL: Well, actually--

MR. ALI: He let him do it over and over and over. He just kept letting him do it, and I don't want that referee in my corner again because he was dirty.

MR. COSELL: That's your side of it. Tony--

MR. ALI: My side of it! I saw it's dirt, and (145) the people watching television see the dirt. What you mean it's my side of it?

MR. COSELL Tony Perez says you outdid Chuck Wepner--

MR. ALI: Outdid him how?

MR. COSELL: In rabbit punching.

MR. ALI: He outdid me. He started the rabbit punching and I did it since the referee wouldn't take the law into his hands, which is his job--since he wouldn't do it, then I did it. Then said both of us did it. And then, after I quit--now if you watch after the beginning, I quit rabbit punching and I had to start holding my hand behind my neck, and that dirty referee continued. He's dirty--

MR. COSELL: Well--

MR. ALI: -- and all Puerto Ricans should be ashamed of him because he is Puerto Rican.

MR. COSELL: Well, I don't think that's necessary to say--

MR. ALI: I think it's necessary.

MR. COSELL: I think its intemporate--

MR. ALI: It's necessary--I have too many good Puerto Rican fans--

MR. COSELL: Furthermore, let's--let's face this fact--

MR. ALI: I have too many good Puerto Rican fans for--for somebody to allow somebody like that to get me on television and fighting a white man--doing everything to take my title --- that's what it was-a conspiracy, and it was all to let anything happen to take my title, and I'll blow my own damn horn because I'm free. He was dirty--the referee was a dirty dog and he was dirty and the world see it and you gettin on television using ABC to promote the dirt and to say that I'm the one.

MR. COSELL: Are you all done?

"Now that you're done, just open up that fist and listen to me for a minute.

MR. ALI: I'm serious.

MR. COSELL: Tony Perez refereed your second fight against Joe Frazier--

MR. ALI: And he did another dirty thing. The bell rung-he started to say the bell rung.

MR. COSELL: And Frazier and Eddie Futch, Frazier's manager, said that Perez favored you-- that you--

MR. ALI: How could he favor me--

MR. COSELL: We're building throughout the--

MR. ALI: How could he favor me, when they're talking--what they favor Frazier. I had the man knocked out and he was almost ready to fall and he stopped it and said the bell ung and make mistake and the damn bell didn't ring, messing me up from knocking out Joe Frazier. I had Joe Frazier going and the world saw it, and he stopped the fight and said go to your corners pretending he thought the bell rung. That wasn't it--didn't want me to knock out Frazier.

MR. COSELL: You all done?

MR. ALI: They got lights on the pole, Budini just said-got lights on the pole to show-the round wasn't over. He didn't see no lights.

"He was paid probably by some gangsters or somebody--uh--uh--uh he had some money bet on Joe Frazier.

MR. COSELL: WE. . . that's just absurd--but we could go on--

MR. ALI: That ain't absurd. You want to attack

MR. COSELL: I'm not attacking you, I'm

MR. ALI: And let this dirt get by. You going to let this dirt get by on me.

MR. COSELL: I'm trying

MR. ALI: Then I'm going to defend myself (148)

MR. COSELL: I'm trying to state the case of man who's not here to face you and answer you head to head.

MR. ALI: Well, he should be here-- .... (149) (emphasis supplied)\*

<sup>\*</sup>Balance of the interview is set forth on pp. 149-156 of the Appendix.

The foregoing underlined statement by Ali gave rise to plaintiff's claim for defamation.

The program was broadcasted as taped with the deletion of a reference by Ali to his "black behind " 306-307). Ali testified that he anticipated the tape would be shown on television and agreed to such a showing by a contract. He expected ABC to delete anything that was illegal(308).

#### The Tilal

Since plaintiff Perez was born in Puerto Rico, brought up in a household where Spanish was the spoken word, he speaks English with a marked Spanish accent. Notwithstanding such obvious linguistic limitations in English, he was frequently and quite unfairly admonished and berated before the jury by the Trial Court for being unresponsive (162, 168, 195,201, 202, 220). In addition, the Court on its own motion struck portions of Perez' testimony(75), criticized him for shouting(98), yelled at him for not waiting for questions to be posed before giving his responses (161-162) and refused to permit him to explain some of his answers upon his request (192-193).

The Court below actively aided defense counsel in the cross-examination of Perez (161, 164-165. 168, 171, 175, 191-192, 195-196, 197, 293, 294, 230, 233 244, 246-247).

Defense counsel was repeatedly permitted to read portions of Perez' examination before trial which were entirely consistent with his trial testimony in a loud, accusatory manner as if the pretrial testimony was inconsistent (169-170).

While any of the foregoing may not be sufficiently prejudicial as to warrant a reversal, the cumulative impact of the Trial Court's

participation was quite prejudicial (171-172) especially when contrasted with the Trial Court's conduct and comments while Ali was on the stand.

The striking difference in approach can be gloaned by comparing the trial exmaination of Perez to that of Ali.

engaged in a private conversation with plaintiff's counsel while the fight films were being shown which the Court obviously deemed prejudicial to the defendant (297, 331). Ali's testimony was marked with frequent, long, unresponsive speeches which the Court not only refused to strike but at one point, he even criticized counsel for interrupting Ali (254, 287, 290, 292, 295, 296, 311, 341-343, 345-346, 349, 352, 372, 374, 375).

The Court absolutely refused to allow plaintiff's attorney to impeach the defendant's credibility in any manner.

The Court would not permit plaintiff an opportunity to delve into Ali's admitted promotional techniques and his reputation and character trait as to untruthfulness. (369).

While Ali was on the stand, the Court was extremely courteous to him, exhibited great protective concern and as a consequence prejudicially restrained the plaintiff's examination of this witness and thus clearly communicated its bias to the jury.

Notwithstanding the Trial Court's restriction and interference in plaintiff's examination of Ali, the proof adduced severely impugned Ali's credibility. Yet, the Trial Court never exhibited or displayed any of the negative reactions and sarcasm towards Ali with which he bombarded Perez.

The undisputed proof adduced that notwithstanding Ali's claim that he truly believed that Perez had been paid by gangsters for his conduct at the Frazier fight (256-258), he never objected to Perez' selection as referee at the Wepner-Ali fight, asserting that he first learned of Perez' selection when he climbed into the ring (249).

The Trial Court thwarted plaintiff's efforts to show that a fighter could and did successfully object to the Commission's referee selection even a few minutes before a scheduled fight when Floyd Patterson refused to get into the ring to fight Charlie Green until the referee was removed and replaced (64).

The Trial Court also refused to allow inquiry as to whether referee Peter Rademacher had been initially selected to referee the Wepner-Ali fight and then was replaced with Perez upon Ali's objection (122, 123).

The defendant retreated from his prior position that he would refuse to work with Perez as referee ever again (241-243).

The record of the Court below reveals that Ali never voiced objection to Perez' selection as referee in Ali's recent championship fight with Ken Norton in New York (65, 504), although the Trial Court refused to allow plaintiff to examine Ali directly on this point branding same irrelevant (256-257).

More importantly, following the Ali-Wepner fight and the

defendant's verbal assault upon Mr. Perez' reputation, Ali invited Perez to act as referee in his fight against Coopman which was held in Puerto Rico, notwithstanding his alleged belief that Perez was paid by gangsters, had a bet on Frazier and his prior stated position that he would never allow Perez to work in his corner again.

Muhammad Ali, who protested throughout the trial that he was known for his clean style of boxing, contended that he called for Perez to act as referee in the Coopman fight because he thought that Perez should be permitted to earn his living (251,254, 291).

At trial, Ali withdrew his claim that Perez was a racist acknowledging that he is not God and is thus not capable of truly knowing such a thing (256-257). Perez denied being angry at Perez when he made his statements on the Wide World of Sports program. He was merely angry at the illegal things which Perez permitted (310-312).

#### The Charge of the Court Below

The Trial Court in its charge advised the jury as follows:

"The undisputed chronological sequence of events he ein appears to be as follows:

On March 24, 1975, immediately after the Ali-Wepner fight, Mr. Perez attended a press conference where (627) he was asked by the reporters some questions regarding rabbit punching during the fight. He testified that he responded that he saw them by both sides. Mr. Perez says that the reporters also asked why he had scored a knockdown of Ali in the 9th round. The reporter told him that Ali claimed that he did not get knocked down.

To this Perez responded that there had been a clean knockdown and that Ali had tripped on his own foot.

Thereafter, on the following day, March 25, Mr. Perez made the following public statements of and concerning Mr. Ali:

"He (Ali) purposely did the rabbit punching. Chuck did not do it. If there was one man who fought dirty last night, I think it was Ali.

" A clean knockdown. Ali tripped on his own feet but he went down from the effect of the punch, in my opinion. He's just embarrassed because a man like Wepner knocked him down."

Three days later on March 28, 1975, Mr. Perez, in a telephone talk with a television reporter, Howard Cosell, of ABC Sports, who was preparing a broadcast on the fight, told Cosell that Ali outdid Chuck Wepner in rabbit punching, and by this he tells us in his testimony before trial, which was read to you here, that he meant that Ali threw more (628) rabbit punches than Wepner, and did it purposely and flagrantly (629).

The Court thereafter read to the jury from plaintiff's complaint advising that the defendant contended that the statements contained therein were also defamatory and actionable along with the statements made by Perez in March of 1975 (629-630).

The Court continued:

"Following the Perez statements to the press of March 24 and 25 and to Cosell on March 28, Mr. Ali was interviewed for television by Howard Cosell in connection with the Perez statements, the Ali-Wepner fight and the events of the 1974 fight. Mr. Perez was the referee in both the 1974 Frazier and in the 1975 Wepner fights."

In the Cosell interview Mr. Ali stated the following which was then televised and broadcast in the ABC Wide World of Sports program on March 29, 1975 between 5:00 and 6:30 p.m..

"I had the man" -- referring to Frazier -"knocked out and he was almost ready to fall and
he"--referring to Perez -- stopped it and said
the bell rung and made a mistake and the damn
bell didn't ring, messing me up from knocking
out Joe Frazier. I had Joe Frazier going and
the world saw it and he"-- referring to Perez -"stopped the fight and said go to your corners
pretending he thought the bell had rung. That
wasn't it.

"They got lights on the poles Bundini just said-(631) got lights on the pole to show -- round
wasn't over. He didn't see no lights. He was
paid probably by some gangsters or somebody or
he had some money bet on Joe Frazier." (631)

The Trial Court thus completely excluded from the jury's consideration Ali's name calling and taunting of Perez in the ring and Ali's subsequent verbal assault upon Perez at the press conference on the day of the fight, all of which preceded Perez'

statement to the press on the day following the fight which is the statement complained of in defendant's counterclaim.

The Trial Court's inaccurate distortion by such material omission of the evidence made it appear as if Perez initiated the dispute and then kept it going by bombarding Ali with an almost daily verbal attack until Ali finally responded upon the Howard Cosell show.

Quoted below are the relevant passages from the transcript where the Court was alerted to its omission by plaintiff's counsel in his exceptions to the charge, with the Trial Court's agitated denials that such evidence even existed, its testy challenges to plaintiff to find such evidence in the record and its ill-humored accusations that plaintiff's counsel was attempting to divert the Court.

"MR. SULLIVAN: The first exception is in the marshalling of evidence as to the undisputed part that Mr. Perez initiated the attack based on the fact that during the fight Muhammad Ali, as has been testified to, called Perez names. Howard Cosell indicated that Muhammad Ali's opponent in the ring was Tony Perez, that he had taken Tony Perez on, and accordingly it it our claim that it is not undisputed that Mr. Perez initiated the verbal attack (648-649).

We would also --

THE COURT You say that Ali called Perez names in the fight and what else did he do?

MR. SULLIVAN: Well, he hit him and he-which his general conduct--Mr. Cosell stated over the air that Mr. Ali had taken Perez on and had spent most of his time fighting Perez as opposed to Wepner. I would also, in that same light, object to the part of the word "assault" as far as initiating the verbal assault since it is our contention that what Perez said was in no way an assault on Ali. I might be mistaken upon this, but in that light I don't think that I heard the charge as to Perez' right to fair comment and to render his opinions (649).

\* \* \*

Finally, in Your Honor's mentioning of the sequence of things that are given, it was an undisputed, Your Honor said, sequence of what had happened. However, Your Honor mentioned a telephone call by Howard Cosell which was not claimed in Ali's complaint or anything of the kind, and left out all of Ali's comments at the press conference. There was no mention made of any of Ali's comments at the press conference, Your Honor, in your statement of what happened.

THE COURT: Ali's comments? Weren't they all broadcast?

MR. SULLIVAN: Yes, Your Honor they were.

THE COURT: Of course I did. I had a separate section stating that thos were the very things that Mr. Perez was complaining about (651).

MR. SULLIVAN: I understand Your Honor. I am talking about in your Honor's initial mention of this as the sequence of how it happened Your Honor stated that Perez' comments at the press conference started it, and then Perez' phone call, and then Ali's comments on the show, but nothing about Ali's comments at the press conference.

THE COURT: I will read it to you. You are completely wrong about that. Following Perez' statements to the press of March 24th and 25th and Cosell on March 28th, Mr. Ali was interviewed for television by Howard Cosell.

MR. SULLIVAN: Yes, Your Honor, but I am talking about the press conference, Ali's press conference right after Perez just a couple of minutes thereafter.

THE COURT: What press conference, what are you talking about? Tell me what date are you talking about and what press conference you want me to include.

MR. SULLIVAN: The day of the fight, Your Honor. Two minutes after Perez' press conference Ali made a few statements to the press-

THE COURT: Show me where that is in the record, or show me whether that is an extrapolation on your part. Give me the record (652).

MR. SULLIVAN: Your Honor, the tape was played--

THE COURT: Please, don't keep flipflopping and waffling all over the lot. You said there was something in the record of a press conference with Mr. Ali. I want to give that information to the jury, if there is any such thing in the record. My recollection is, having read the record thoroughly over the weekend, that there is no such thing. You find it for me at this point.

MR. SULLIVAN: Your Honor, I will try to find it.

THE COURT: You better do better than try to find it. You better find it or withdraw your statement.

MR. SULLIVAN: I would like to state, Your Honor, that--

THE COURT: Please do what I have asked you to do then you can reserve all your argument until later. I want to know the exceptions. I want to know whether there is any proof of a press conference given by Ali following the fight on March 24, 1975". (653)

The Court then turned to defense counsel and asked him whether he was aware of any such passage in the record in this case, to which Mr. Sharfman replied:

"No, sir. I reviewed the record this weekend also". (654)

Defense counsel actively misled the Court while counsel for the third party defendant stood by in silence in accordance with his low profile trial strategy.

Set forth below are those portions of the transcript which reveal not only the inaccuracy of the Court's recollection of the evidence, but defense counsel's misrepresentation of the evidence which he had to have known included Ali's remarks at the press conference because he initially objected to the introduction of the tape of said conference and then when his objection was overruled, he sought to have its introduction limited solely to the issue of plaintiff's right of reply. (Court Exhibits 7, 10, 11).

During the cross-examination of Perez, defense counsel asked Perez many questions concerning what he said at the press conference to reporters following the fight (174-180) in an effort to establish that Perez initiated the controversy. The Court below actively aided defense counsel in eliciting the information which he sought and overruled an objection made by plaintiff's counsel which suggested that the tape of the press conference should be played in that same constituted the best evidence of what Perez said to the reporters following the fight\*(Court's Exhibit 7).

<sup>\*</sup>Mr. Perez' actual comments at the press conference were quite innocuous as can be readily seen from the Court's summary of same in his charge to the jury (627-628) and from the transcript of the press conference tape which does not even include the statements concerning rabbit punching which the defendant contended that he made and the Court advised the jury of in its charge. (Plaintiff's Exhibit 4 for identification)

During cross-examination of Perez, Mr. Ali's trial attorney established that Perez telephoned Mr. Cosell prior to the Cosell interview with Ali (222-225). On redirect, plaintiff's counsel asked him if he was present at the press conference when Ali spoke to the reporters and if he heard the remarks made by Ali to the press, to which Perez responded affirmatively (237-238). Plaintiff's trial counsel then stated:

"At this time, I would like to play the tape of Mr. Ali at that press conference, the remarks Mr. Perez heard before the telephone conversation to Mr. Cosell.

THE COURT: How is that redirect?

MR. SULLIVAN: Mr. Sharfman questioned Mr. Perez about what comments he made to Mr. Cosell, whether they were dirty fighting, et cetera, and he stressed that they were before Mr. Perez heard Mr. Ali on the program with Mr. Cosell, and he stressed who spoke first et cetera. Mr. Perez has just testified now that he heard Mr. Ali at the press conference making remarks that he did before he spoke to Mr. Cosell (239).

THE COURT: I am going to permit you to do it. I don't think it is proper redirect. I will allow you to reopen your direct examination for that purpose.

MR. ELDRIDGE: ABC Sports and ABC will have an additional objection.

MR. SHARFMAN: Your Honor, I would like to object to this procedure.

THE COURT: The objection is overruled.

(Tape played)

THE COURT: You represented that as being the purported statement of Ali that the plaintiff Perez claims that he saw before Cosell examined him. Nothing about Ali has been shown thus far, and that should not have been shown under that representation.

MR. SULLIVAN: I'm sorry, Your Honor.

A VOICE: I will get the exact place for you.

THE COURT: When you announce you are going to do something and I allow it, don't change the bidding. Court's Exhibit 10 has been marked. The tape, insofar as it had to do with the alleged interview that was allegedly shown to this witness before he allegedly was interviewed by Cosell, may be shown, but not the rest of that stuff that has been improperly presented thus far (240).

As to the Court's Exhibit 10, there was an objection by Mr. Sharfman which started:

"Objection to tape.

This should be viewed by Your HOnor first to determine its appropriateness for the jury to see."

Immediately after the Court overruled defendant's objection to the playing of this tape, the record unmistakeably states at page 240 that the tape of Ali's press conference remarks was then played for the jury:

"Tape of press conference played.)

THE COURT: The Court's Exhibit has been played.

MR. SULLIVAN: Plaintiff's Exhibit 4 for identification.

THE COURT: With reference to Plaintiff's Exhibit 4 for identification which has just been played, I have received Court's Exhibit 11, and the objection there goes to matters of law that are to be dealt with at a proper time in the case, but it is not a proper objection to the playing of Exhibit 4. It is consequently overruled." (241)

As to Court's Exhibit 11 there was another objection by Mr. Sharfman to the playing of the press conference remarks of Ali which stated:

"Objection to introduction of tape except as limited to Perez' right of reply".

It is submitted that the objections of Ali's defense counsel and his subsequent recross-examination of Perez which is quoted below in its entirety establishes and highlights the very carefully stated misrepresentation which he made when he flatly denied to the Court any awareness of any passage relating to Ali's press conference remarks in the record, after having allegedly reviewed the record over the weekend.

- Q. "As to the tape that the jury just saw, you never saw that tape before today, did you, sir, is that correct?
  - A. It is not (243).
- Q. You never saw that tape other than in connection with this lawsuit, did you sir?
  - A. Right.
- THE COURT: In other words, the first time saw that tape was after this lawsuit was started?
- THE WITNESS: I just told him this is nothe asked me if this the first time that I saw that I said it is not the first time.

THE COURT: You are not answering my question.

THE WITNESS: I'm sorry.

THE COURT: Did you see the tape, Exhibit 4, for the first time after April, 1975 when this lawsuit was started?

THE WITNESS: Correct.

THE COURT: So you didn't see it before the interview with Cosell did you?

MR. SULLIVAN: Could we clarify "it" please?".

THE COURT: "It" meaning Exhibit 4 (244).

Upon redirect, plaintiff's trial counsel reestablished that Perez had previously testified that he had in fact actually heard Ali's remarks when they were made live at the press conference prior to speaking to Cosell as opposed to the Court's misconception that his testimony was that he claimed to have seen the tape of Ali's press conference remarks prior to making the call to Cosell.

Further illustration of the Court's statements which could lead a jury to assume a judicial bias was the Court below's unfair rebuke at plaintiff's counsel, which impliedly attacked the credibility of plaintiff before the jury and which was precipitated entirely by the Court's miscomprehension and misstatement of plaintiff's testimony:

"THE COURT: The tape was presented previously to the Court and the Court allowed it over an objection because it was allegedly shown to the witness on the stand now, before Cosell asked him questions.

MR. SULLIVAN: I don't think that is correct Your Honor.

THE COURT: I am sure it is not correct in the light of his last answer. He said he didn't see it until the lawsuit started, long after the Cosell interview.

MR. SULLIVAN: Yes, sir, that is correct.

Mr. Perez, not the tape, but did you see it and hear it live when it happened before the Cosell phone call?

A. Yes. I saw it live when it happened the night in the Coliseum.

Q. The tape is a tape of what you saw live happen before the Cosell phone call, is that correct? (245)

A. Yes (246).

The Court thereafter countered by assisting defense counsel in establishing that Ali's press conference remarks came after Perez spoke to the reporters at the conference (246-247).

Notwithstanding the Trial Court's active participation in that portion of the trial which concerned Ali's press conference remarks, when plaintiff's counsel attempted again to correct the error made in the charge due to the Court's misapprehension of the evidence, the following exchange occurred:

"MR. SULLIVAN: Your Honor, I point to page 243 of the testimony on October 13, 1976. I state that it really starts on page 22 - line 22 I'm sorry.

THE COURT: In the Perez redirect testimony to which you have called attention he was questioned on recross examination by Mr. Sharfman as to whether he had seen the tape of the Frazier fight prior to the time of this trial, and he stated that he never saw the tape other than in connection with the lawsuit.

In other words what you have done is to divert me from your point.

MR. SULLIVAN: Your Honor, that doesn't say the Frazier fight, I don't think. I am not trying to divert. I think it says as to the tape that the jury just saw. They are not talking about the taped conference which apparently wasn't taken down by the reporter.

THE COURT: What do you mean? Do you mean this record is false, is that what you are saying now.

MR. SULLIVAN: No, I am not saying it is false.

THE COURT: Are you saying this trial record is inadequate.

MR. SULLIVAN: I am not trying to say that Your Honor. I played the press conference (655).

THE COURT: You are not careful at all in your speech. I have something to say to you about something you said in summation too.

MR. SULLIVAN: If I may just summarize-

THE COURT: You called my attention to page 243 as something that you say related to the events immediately after the fight showing that there was something in the record concerning a speech made by Ali to press reporters, and there is just nothing on page 243 in that connection.

MR. SULLIVAN: May I try to refresh Your Honor's recollection?

THE COURT: Are you calling my attention to 243 or are you calling my attention to some other thing you are flitting to now?

MR. SULLIVAN: 243 and something else that I am flitting to Your Honor.

THE COURT: Show me what else you are flitting to . . . Show me the page.

MR. SULLIVAN: It is a continuation on 244 where it shows that the exhibit we are talking about now is Exhibit 4, the Frazier fight was Exhibit 2. I am not talking about-

THE COURT: What you are saying to me is you are referring to Exhibit 4 and Exhibit 4 has nothing whatsoever to do with a conference that Ali is supposed to have had with the press on March 24, 1975.

Now what are your other exceptions?

I don't want to hold this jury up endlessly while you are trying to make up your mind as to something that doesn't exist. (657)

Even without benefit of a video tape recording which would show the tone inflections and facial expressions the prejudicial bias evinced by the foregoing discourse is evident. The use and connotation of the words "false, flitting and divert" need no further comment apart from the observation that it was not an isolated instance.

Although the Court below denied that the evidence existed and caustically rebuffed plaintiff's efforts to refresh its recollection choosing to rely upon defense counsel's 'faulty' review of the record, Ali testified at trial about the remarks which he made at the press conference after viewing same in the courtroom while Perez was on the stand:

- "Q. So when you said that you were going to make films and go to Watts and preach the sermon of hate against Mr. Perez, when you said that, did you mean that?"
- "Q. Did you make that statement, sir?
  - A. The sermon of hate, no sir, I didn't say hate. I said I'd preach a sermon in every mosque, in every Watts. I was angry at the time. I never did -- I said I was preaching a sermon on injustice and racism and evil that is allowed to be practiced at that time. I'm not angry. He's my brother in religion and God.

That official also there at ringside and the State Commission, none of them penalized him for doing that, so I'm going to preach against this individual, against what he done to me. I'm not against that man. He's a brother in the flesh.

- "Q. Did you say you were out to get the referee?"
- Q. Did you say that?
- A. Not in the way you interpret it.
- Q. Forget about my interpretation. I'm sorry if I interpreted it wrong.

THE COURT: You can't forget interpretation. If you don't want to ask your question, don't ask it.

- Q. Regardless of any interpretation, did you say those words?
  - A. Yes, sir, that is right, on tapes They don't lie

Q. Did you mean it at the time, sir.

A. Yes, sir."

In fact, Ali testified as follows:

"A--I had a big press conference. I figured one day a court case or something would come up" (290).

The Trial Court improperly limited the right of reply to Ali in accordance with its erroneous view of the evidence (636-638). The Court stated:

"The right of reply cannot be claimed by Mr. Perez because it was he who initiated the verbal bout. He was not replying to any comment by Ali."

It advised the jury that when Mr. Ali spoke on the Wide World of Sports program he did so upon a privileged occasion by reason of his right of reply with a presumption that he acted with good faith (637).

The jury was advised that this privilege could be overcome by proof that Ali spoke with malice, and that as used herein malice would include spite or ill-will as well as knowledge of the falsity of what is said or reckless disregard for the truth in saying it (637).

The evidence of Ali's spite or ill-will toward Perez as demonstrated in his remarks at the press conference was excluded from the jury's consideration as indicated.

After the jury retired for deliberations, they requested a copy of the statements made by Perez at the press conference (664-665) (emphasis supplied).

Mr Sharfman immediately suggested that there was testimony in the transcript from Mr. Perez as to what he said at

the press conference (665) because he knew that the only proof relating to Mr. Perez' press conference remarks was from his trial testimony elicited during cross examination. Thus, Mr. Sharfman was seeking to avoid the playing of the press conference tape so that his earlier misrepresentation as to Ali's press conference remarks would not be exposed.

Upon the consent of counsel precipitated by the obvious confusion of everyone except defense counsel, the Court erron-eously submitted a copy of Perez' statement to the press on March 25, the day following the fight as opposed to his press conference statements as asked for by the jury (666-667).

The jury thus considered those remarks which appear at p. 628 of the Record which give rise to the counterclaim instead of Perez' innocuous answers to questions posed by the press at the conference immediately following the fight.

In response, the Court sharply interjected as follows:

"THE COURT: Please. They said they want the statement made by Mr. Perez to the press conference. That's what they are going to get, nothing more and nothing less."

The jury did not get what it asked for from the Court, irrespective of the foregoing statement.

### POINT I

THE COURT'S OMISSION AND MISSTATEMENTS AS TO PIVOTAL EVIDENCE REQUIRES THE GRANTING OF A NEW TRIAL

The refusal of the Trial Court to correct its charge to accurately reflect the extremely important evidence with respect to the chronological sequence of events which gave rise to this action is assigned as prejudicial error.

The Trial Court's distorted analysis of the chronological sequence of the events which it characterized as "undisputed" precluded any meaningful consideration by the jury of important elements of plaintiff's proof which tended to establish defendant's actual malice, namely, defendant Ali's remarks concerning Perez at the press conference which immediately followed the Ali-Wepner fight.

It is submitted that those remarks evidenced Ali's state of mind, lack of good faith and intention, his anger, spite and ill-will, and his determination to malign Perez' personal and professional reputation and character.

In Goldwater v. Ginsburg, 414 F.2d 324, 342 (2nd Cir. 1969), this Court stated:

"There is no doubt that evidence of motive and of intent may be adduced for the purpose of establishing, by cumulative and by appropriate inferences, the fact of a defendant's recklessness or of his knowledge of falsity".

At the press conference, Ali repeatedly called Perez 'dirty', 'a dirty referee', 'dirty all over the world', 'a

dirty dog' and a 'a racist'. He accused Perez of pretending to hear a bell when he had Joe Frazier knocked out. He stated to the world at the press conference that he was going to talk about Perez, to campaign against him and to preach a sermon protesting against the referee. He announced that he was going to get the referee.

Ali of course professed that he truly believed the statements made about Perez' alleged corruptconduct on the Cosell show.

To show Ali's state of mind and lack of good faith, in view of his testimony, plaintiff had to rely on circumstantial evidence which when considered cumulatively might lead a jury to reasonably conclude that Ali made his statements about Perez with actual malice. This evidence consisted of the following:

l. Ali's reliance upon an alleged anonymous telephone call he received on the day of his fight with Frazier warning that the referee had been reached actually preceded the referee's selection by the Boxing Commissioner by six hours.

At trial, Ali expressed shock to plaintiff's counsel when he asked Ali if he thought the call was from the Boxing Commissioner (283-284). Yet, the undisputed testimony establishes that only the Boxing Commissioner may have known whom he would ultimately select to act as referee for that evening's fight at the time the anonymous telephone call was received.

2. Although Ali claimed at the press conference and subsequently upon the Cosell show and again on trial that he had Frazier almost knocked out when Frazier was saved by Perez' premature ending of the round, defendant Ali admitted in his autobiography that because of a medical problem he was having with his hands prior to the Frazier fight, he was very careful of his hands in the fight and was thus not sure that he really hit Frazier that hard or was capable of hitting Frazier that hard so as to knock him out in the second round.

Moreover, Ali persistently asserted that Perez pretended to hear a bell which he did not hear nor did anyone else. Yet, in his autobiography, Ali stated that the timekeeper rang the bell too soon.

The three knockdown rule applied to the Frazier-Ali fight. Defense expert Jimmy Jacobs testified that the 20 seconds which remained in round 2 would not have been sufficient time in which Ali could have knocked Frazier out (526-527).

- 3. Notwithstanding that Ali allegedly believed that Perez deliberately stopped the second round prematurely in the Frazier fight and he claimed to have received a second anonymous telephone call on the day before the Wepner-Ali fight advising him that the referee had again been reached, Ali raised no objected to Perez' selection as referee for the Wepner-Ali fight.
- 4. Although Ali displayed great outrage at the press conference complaining that Wepner was permitted to fight 'dirty' using illegal kidney and rabbit punches, the evidence showed that Ali anticipated Wepner's roughhouse style of fighting which included such punches prior to the fight and attempted to prepare himself for same.

In fact, his trainer Dundee testified that upon spying at the Wepner camp and noting his method of fighting, Dundee and Ali d; ussed the matter and Ali assured Dundee that he could take care of it (458-459, 514).

- 5. Ali displayed what was characterized as unsportsmanlike conduct in the ring in the Wepner fight. From the beginning of the fight, as Cosell indicated in his round by round commentary, Ali appeared to make Perez his adversary instead of Wepner. At one point he hit Tony Perez and Perez testified further that he was called 'a white mother fucker' repeatedly in the ring by the defendant (111-119, 127, 157-158).
- 6. Although Ali stated at the press conference that he would get Perez and see to it that he never worked in his corner again, Ali never raised any objection to Perez' possible selection as referee by the New York State Boxing Commission in his recent bout with Ken Norton (504).
- 7. When Ali was to fight Coopman in Puerto Rico following his statements to the press and Cosell wherein he called Perez dirty and corrupt, he announced that he wanted Perez to referee his Puerto Rican fight (251-254).
- 8. Ali recanted his press conference and television remarks with respect to Perez insofar as he branded him as a racist and stated that only God could know that for sure and thus acknowledged serious doubts as to the truth of some of his comments about Perez (257).
- 9. When Cosell commented that Ali's statements about Perez were absurd, Ali responded to such comments with personal attack

upon Cosell, evidencing his clear intent to injure Perez irrespective of the contrary opinion communicated to him.

- 10. Defendant's appearance at the press conference wherein he announced his plan to attack Perez before the word and viciously characterized Perez' performance as 'dirty', calling Perez' a dirty dog', 'a dirty referee, 'a corrupt referee' evidenced an intent to attack Perez regardless of the facts. The transcript of the press conference which appears in the appendix discloses Ali's motive in that he was attempting to excuse his own poor performance in the fight.
- 11. At trial Ali conceded that he was extremely angry at the time of the press conference and thereafter about the "dirt" which was permitted in the ring against him although he denied being angry at Perez, notwithstanding his further belief that Perez was paid by gangsters and had a bet on Frazier and was part of a conspiracy to take his title away (309-310).
- 12. Ali acknowledged that when he made his statements about Perez' alleged corrupt conduct he did not know for sure that Perez had a bet on Frazier and had been paid by gangsters (310) and conceded that he assumed that there was something shady about Perez' conduct because he could not think of another way to explain Perez' conduct (311).
- 13. Ali made no investigation to verify the truthfulness of his statements about Perez. His own trainer Angelo Dundee would not support Ali's defamatory statements concerning Perez, stating that he believes Tony Perez to be an honest man and still believes that of him, notwithstanding the mistake he made in the

Frazier fight and his allegedly poor performance in the Wepner fight.

The foregoing type of evidentiary analysis was made in <u>Goldwater</u> v. <u>Ginsburg</u>, <u>supra</u>, wherein this Court acknowledged that recklessness is only negligence raised to a higher power, stating:

"To hold otherwise would require that plaintiff prove the ultimate fact of recklessness without being able to adduce proof of the underlying facts from which a jury could infer recklessness. It would limit successful suits to those cases in which there is direct proof by a party's admission of the ultimate fact, certainly a situation not intended by the Supreme Court. See St. Amant v. Thompson, supra, 390 U.S. at 732-733, 88 S.Ct. 1323".

In the case at bar the Trial Court's exclusion of the press conference remarks of Ali in its charge had a two-fold effect upon the jury's determination:

- l. It erroneously emasculated the proof adduced at trial on behalf of plaintiff from which the jury could infer actual malice, i.e., publication of the defamatory statements with know-ledge of their falsity or with reckless disregard for their truthfulness; and
- 2. Marshalled the evidence in a one-sided and distorted manner so as to make it appear as if Perez initiated the verbal bout with defamatory attacks upon the reputation of Ali, reflecting the Trial Court's misapprehension of the evidence.

With respect to the Trial Court's emasculation of plaintiff's evidence in its submission to the jury, upon exception of plaintiff's counsel, it impliedly acknowledged the importance of Ali's

alleged remarks at the press conference, assuming they existed. He stated:

"THE COURT: Please, don't keep flipflopping and waffling all over the lot. You said there was something in the record of a press conference with Mr. Ali. I want to give that information to the jury, if there is any such thing in the record." (653)

His misplaced confidence in the accuracy of his charge was reinforced by defense counsel's active misrepresentation of the record (654).

In view thereof, this Court is respectfully requested to remand this case for hearing in the event any party herein fails to admit or contests that plaintiff presented Ali's press conference remarks to the jury.

The Trial Court's one-side analysis of the evidence constituted error of a highly prejudicial nature. In Quercia v. United States, 289 U.S. 466 (1933), the Court in reflecting upon the role of a trial judge in its instructions to the jury made the following observation:

"In a trial by jury in a federal court, the judge is not a mere moderator, but is the governor of the trial for the purpose of assuring proper conduct and of determining questions of law. In charging the jury, the trial judge is not limited to instructions of an abstract sort. It is within his province, whenever he thinks it necessary, to assist the jury in arriving at a just conclusion by explaining and commenting upon the evidence, by drawing their attention to the parts of it which he thinks important; and he may express his opinion upon the facts, provided he makes it clear to the jury that all matters of fact are submitted to their determination. Sir Matthew Hale thus described the function of the trial judge at common law: 'Herein he is able, in matters of law emerging upon the evidence to direct them; and also in

matters of fact to give them a great light and assistance by his weighing the evidence before them, and observing where the question and knot of the business lies, and by showing them his opinion even in matters of fact; which is a great advantage and light to laymen.' Hale, History of the Common Law, 291, 292. Under the Federal Constitution the essential prerogatives of the trial judge as they were secured by the rules of the common law are maintained in the federal courts.

"This privilege of the judge to comment on the facts has its inherent limitations. His discretion is not arbitrary and uncontrolled, but judicial, to be exercised in conformity with the standards governing the judicial office. In commenting upon testimony he may not assume the role of a witness. He may analyze and dissect the evidence, but he may not either distort it or add to it. His privilege of comment in order to give appropriate assistance to the jury is too important to be left without safeguards against abuses. The influence of the trial judge on the jury 'is necessarily and properly of great weight' and 'his lighest word or intimation is received with deference, and may prove controlling.' This Court has accordingly emphasized the duty of the trial judge to use great care that an expression of opinion upon the evidence 'should be so given as not to mislead, and especially that it should not be one-sided'; that 'deductions and theories no warranted by the evidence should be studiously avoided.' He may not charge the jury 'upon a supposed or conjectural state of facts, of which no evidence has been offered.' (And in criminal cases) it is important that hostile comment of the judge should not render vain the privilege of the accused to testify in his own behalf".

When plaintiff's counsel attempted to correct the Trial Court by pointing that portion of the record which reflected plaintiff's evidence of Ali's press conference comments, the Trial Court arbitrarily rejected plaintiff's citations and inaccurately stated that Plaintiff's Exhibit 4 for identification was a tape of the Frazier-Ali fight (656-657).

The Trial Court's characterization of the sequence of events as undisputed was a material error requiring a new trial and the fact that the Court was of the opinion that there was no evidence on the point on which the instruction was asked is immaterial.

The accurate chronological sequence of events herein is as follows:

1. Perez was called into a room in the Cleveland Coliseum where reporters were gathered for a press conference in accordance with the usual custom and practice following a title match and was asked questions concerning the Wepner-Ali fight to which he innocuously replied that in his opinion both sides had rabbit punched, (Ali conceded that he intentionally rabbit punched Wepner), Ali was knocked down in the 9th round as a result of tripping on his own feet and that he stopped the fight prematurely in the 15th round because he was afraid Wepner would be severely or permanently injured if it continued.

These remarks are not even claimed as defamatory statments in defendant's answer.

2. Ali then appeared before the press at the same conference immediately following the fight and blasted Perez as 'a dirty dog', 'a dirty referee', 'a racist' and stated his intention to get Perez, campaign against him and preach sermons against him. He accused Perez at that press conference of having pretended to have heard a bell in the Frazier-Ali fight when he had Frazier knocked out. Perez stood by and listened as Ali made these statements to the press.

It is to be noted that the statements made by Ali were in response to a question posed by the press wherein he was asked to evaluate Perez' performance.

- 3. On the day following the fight, Perez made a statement to the press in response to questions wherein he stated in his opinion Ali purposely rabbit punched, whereas Chuck Wepner did not and that if there was one man who fought dirty' Perez thought it was Ali. He further stated that Ali tripped on his own feet as a result of a clean knockdown indicating that Ali was embarrassed because a man like Wepner had knocked him down.
- 4. On March 28, 1975 Perez telephoned Cosell whom he knew was preparing a broadcast on the fight with an interview of Ali, out of concern that Ali might repeat his press conference attack upon national television. Perez was assured by Cosell that in the event Ali repeated his defamatory remarks he would attempt to present Perez' side of the controversy in reply thereto.

Cosell testified at trial that he based his interview with Ali upon newspaper articles read and the positions of Perez which had been established therein (488-489).

5. Ali appeared upon the ABC Wide World of Sports in an interview with Howard Cosell wherein he again blasted Perez'

'dirty performance' in the Wepner-Ali fight, that Perez was part of a conspiracy to deprive him of his title and of course that Perez had bet on Frazier causing him to pretend that he heard a bell in the second round, etc.

It is submitted that the foregoing accurate analysis of the evidence discloses that Perez did not initiate the verbal bout as the Trial Court instructed the jury.

The Trial Court's erroncous conclusion in this regard precipitated further error by the Trial Court's instruction that the right of reply was a privilege to be accorded only to Ali under the facts as misstated by the Court.

The qualified privilege of reply is available only to one who has been defamed in the first instance and who in response to the attack responds in kind. It is elementary that the first attacking statement be defamatory. Shenkman v. O'Malley, 2 A.D.2d 567 (1st Dep't 1956).

The only testimony which Ali claimed in his counterclaim was defamatory was the statement made by Perez to the press on the day following the fight subsequent to Ali's appearance before the press where he attacked and maligned Perez personally and professionally.

In Reynolds v. Pegler, 223 F.2d 429 (2nd Cir. 1952), this Court stated the following with respect to the privilege of reply:

"By way of background it is well to bear in mind that the defense under consideration is one of 'qualified' privilege. Thus, even when applicable, it affords no protection to defendants, unless it is found as a fact that the alleged defamatory matter was published in good faith. Accordingly, where the alleged libel is justified by way of defense as a reply to a prior attack upon the defendant by the plaintiff, the New York cases, assuming them to be applicable, place upon the trial judge the duty to determine in limine, as a matter of law, whether the content of the alleged libel is pertinent or relevant to the matter contained in the purported initial attack, Guenther v. Ridgway Co., 1st Dept. 1919, 187 App. Div. 593, 176 N.Y.S. 89; Mencher v. Chesley, Sup. Ct., Kings 1948, 193 Misc. 829, 85 N.Y.S.2d 431; Lubliner v. Reinlib, Sup. 1946, 62 N.Y.S.2d 212; Lovell Co. v. Houghton, 1889, 116 N.Y. 520, 22 N.E. 1066, 6 L.R.A. 363, and, in this connection, the New York courts have held that the requirement is satisfied if the alleged libel is addressed to the plaintiff's motive in taking the initiative, Collier v. Postum Cereal Co., 1st Dept. 1912, 150 App. Div. 169, 134 N.Y.S. 847. If pertinency is absent, the defense of privilege is unavailable and there is no need for further inquiry. If, however, the court is satisfied that the content of the alleged libel is related to the subject matter of the plaintiff's claimed attack or to the plaintiff's motive in making the attack, the case is an appropriate one for the invocation of the privilege of reply, and the remaining question is whether the defendant's reply was made in bad faith, in which event the defense fails. It is the function of the jury to pass upon the question of whether or not defendant published the alleged defamatory matter in good faith, as this is a subject on which reasonable men may differ."

It is submitted herein that even if this Court were to uphold the Trial Court's conclusion that Perez initiated the bout which entitled Ali to a privilege of reply, the Trial Court's distorted marshalling of the evidence excluded material evidence of Ali's bad faith, ill will and spite, evidencing his malice

which would or could have overcome the privilege.

Hence, plaintiff contends herein that the judgment of the Court below must be reversed because of the Trial Court's refusal to correct its charge so as to accurately reflect the evidence adduced and thus precluded the jury's consideration of material elements of plaintiff's proof.

#### POINT II

THE TRIAL COURT'S INTERFERENCE IN AND CURTAILMENT OF PLAINTIFF'S EXAMINATION OF THE DEFENDANT AND ITS PREJUDICIAL COMMENTS AND CONDUCT TOWARDS PLAINTIFF AND HIS COUNSEL DEPRIVED PLAINTIFF OF HIS RIGHT TO A FAIR TRIAL

The Trial Court's prejudicial restriction of plaintiff's examination of the defendant

A trial requires that issues presented should be accepted or destroyed or explained in whole or in part by extensive cross-examination or opposing testimony.

In a libel action where the parties stipulated status requires clear and convincing evidence that the defamatory statements were uttered with actual malice, that is, with knowledge of their falsity or in reckless disregard for the truth thereof, the credibility of the party uttering the defamatory matter is critical to a determination of the complainant's right to recover.

In the case at bar, the Trial Court took the erroneous position that since the defendant was called to the stand by the plaintiff as his witness, the plaintiff was prohibited from impeaching him on matters which he characterized as collateral and from inquiring into his character for truthfulness (249-250)

Defendant Ali was called as an adverse party witness in plaintiff's case-in-chief. After Ali testified that he believed the alleged defamatory statements he uttered about plaintiff were true, plaintiff attempted to impeach Ali.

Since the adoption of the Federal Rules of Evidence there can be no question that in a Federal Court a party may impeach his own witnesses. Rule 607 expressly states:

"The credibility of a witness may be attacked by any party, including the party calling him."

Rule 607 sweeps away the traditional common law rule that a party may not impeach his own witness. No longer is a party deemed to have "vouched" for his witnesses. Weinstein's on Evidence ¶607 [1].

The methods of impeaching a witness are governed by Rules 608 and 609. (Rule 609 deals with impeachment by proof of prior convictions and is inapplicable to the present discussion).

A party may impeach a witness, including one he called, pursuant to Rule 608, which states:

- "(a) Opinion and reputation evidence of character. The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.
- (b) Specific instances of conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning his character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of untruthfulness of another witness as to which character the witness being cross-examined has testified."

Thus, Rule 608 recognizes that a witness' credibility may be impeached by proof of his reputation and the most commonly used methods of impeaching one's reputation is through a community representative who testifies as to the witness' reputation in the community for either truth and veracity.

The Trial Court erred when it prevented plaintiff from further questioning Mr. Ali as to his previous statements indicating that he uttered knowingly false statements or uttered false statements recklessly without regard for the truth of the matter asserted therein. Plaintiff attempted to introduce this evidence to prove that Ali consistently made a habit of uttering known falsehoods or statements without regard for the truth of their contents. Plaintiff attempted to offer such evidence, pursuant to Rule 608 for the sole purpose of impeaching the credibility of Ali.

Rule 608(b)(1) permits a party to impeach a witness while cross-examining him, by use of prior specific instances. Ali was an adverse party witness. Pursuant to Federal Rule of Civil Procedure 43(b),

"A party may call an adverse party. . . interrogate him by leading questions and contradict and impeach him in all respects as if he had been called by the adverse party. . .".

The practical effect of Federal Rule of Civil Procedure 43(b) is that when an adverse party is called as a witness, the examination is conducted as a cross-examination. A fortiori Federal Rule of Evidence 608(b), which is applicable to cross-

examination is, therefore, also applicable to those situations where the witness to be impeached is an adverse party on a direct examination since in fact this examination serves the identical function of cross-examination.

Plaintiff respectfully suggests that the evidence which he attempted to offer as to Ali's prior conduct on the question of credibility as well as truthfulness and veracity was of great probative value on the issue of Ali's credibility as a witness. Balancing this against the counterweight of prejudice to the defendant, plaintiff respectfully submits that the inevitable conclusion is that the testimony as to defendant Ali's prior statements indicating specific prior instances of Ali's total disregard and recklessness for the truth of statements he uttered was clearly admissible.

The Trial Court blocked plaintiff's introduction of the defendant's autobiography which contained critical admissions at variance with his trial testimony until after Mr. Ali had left the witness stand (312, 354-358, 424, 471-472).

The Trial Court thwarted plaintiff's efforts to show that Ali knew on the day before the Wepner fight that Perez was to referee the fight because he allowed Perez to take his picture with his arm about Perez' girl friend (249-250, 509\*).

The Trial Court consistently sustained objections to any questions which related to instances of Ali's prior conduct which reflected upon his credibility (273-274, 275-276, 282, 369).

<sup>\*</sup>On rebuttal,
When Perez was recalled to the stand to identify the photograph
which he took of Ali and his girl friend on the day prior to the
Wepner fight in Cleveland, Ohio, the Trial Court refused its
admission into evidence (509).

In Lewis v. Baker, 526 F.2d 470 (1975), this Court observed:

"The relevancy of testimony which aids in the jury's determination of a party's credibility and veracity has been repeatedly affirmed." (475)

It is submitted that the Trial Court's improper restriction of plaintiff's right to cross examine defendant Ali prevented plaintiff from conducting an effective cross-examination warranting the direction of a new trial.

## The Trial Court's uneven treatment of the parties before the jury

The influence of a trial judge upon a jury is necessarily great and his opinion of the evidence would accordingly be received with the greatest of respect and deference and amy even prove to be controlling upon a jury. Hence, any expression by the Trial Justice should not be one-sided or hostile so as to preclude the jury's impartial determination of the credibility of a party and a fair evaluation of the weight which should be accorded his testimony.

In the case at bar, the Trial Court's participation in the cross examination of Perez on behalf of the defense is so pervasive that the details cannot be fully discussed herein other than to refer this Court to the following pages of the Appendix whereat the prejudicial nature of the conduct of the Court below is revealed: 88, 98, 158, 161-162, 164-165, 168-169, 171-173, 175, 177, 186, 190-193, 195-197, 198-205, 208, 230, 233, 240-241, 244-247) When this conduct is contrasted with the Trial Court's interference in and obstruction of plaintiff's examination of Ali, the bias which was displayed before the jury becomes evident: 249-251, 253-257, 259-260, 261-262, 267,269,

276, 280, 282, 287, 289, 290-292, 295, 301, 308, 311-313, 326, 328, 330, 43, 345-346, 349, 352-353, 364, 369, 372, 374-378, 471-472).

# The Trial Court's uneven treatment of the counsel before the jury.

The Trial Justice's obstinate, inexplicable refusal to correct its charge the jury, relying upon defense counsel to confirm its erroneous analysis of the record rather than examine those portions of the record cited to it by plaintiff's counsel is just further evidence of the contempt which the Court displayed throughout the trial towards the plaintiff, his case and his counsel.

As is apparent from the exchange which took place between the Court and the plaintiff's trial attorney, upon his stating an exception to the Court's omission in its charge, the Trial Court immediately resorted to criticism of counsel attacking his speech as not careful (656) and threatening him with action by the Court for reference in his summation to defendant's testimony as having been dreamt up by a lawyer which constituted the direct accusation of professional impropriety. (663)

It is submitted that defense counsel's active misrepresentation of the evidence in the record to the Trial Justice and third party defendant counsel's passive misrepresentation of said evidence warrants the condemnation of this Court.

It is also submtted that the Court's reaction to plaintiff's exceptions to the charge was just a continuance of the rebuke hurled at counsel throughout the course of the trial.

For example, during the course of theplaintiff's direct testimony, plaintiff's counsel show plaintiff several rounds of the Frazier-Ali

fight. Defense counsel requested that plaintiff be directed to show the entire fight in sequence whereupon the Court advised that the defense would be given an opportunity at a later time to present whatever portions of the fight which plaintiff omitted. Then, quite suddenly, the Trial Court reversed itself and directed plaintiff's trial counsel to play the entire fight for continuity and to save time. Plaintiff's trial attorney indicated that he had no objection to showing the entire fight provided he did not lose his right to show certain rounds of the film to the defendant when he took the stand. The Court abruptly replied:

"The right you are losing is the right to waste time." (99-100)

While plaintiff's counsel was permitted to show the fight films to defendant Ali he was thereafter criticized by the Court for wasting time and showing the films ad nauseum (472-473, 484).

When defense counsel distorted the pre-trial deposition testimony of plaintiff during cross-examination, plaintiff's attorney objected and requested permission to read portions thereof for clarification and continuity (172). The Court refused such an interruption in the conduct of the cross-examination and later chastized counsel for even requesting it (186).

The Trial Court's evident bias had to have a drastic effect upon the impartiality of the jury, and has led inevitably to this appeal. The full scope and ramifications of the Court's prejudice, which may be gleaned from a full reading of the transcript of the trial, mandate the direction of a new trial.

### CONCLUSION

Plaintiff is entitled to a remand and a new trial in this matter and this Honorable Court should so order and direct.

Respectfully submitted,

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